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MEMORANDUM

To: Utah State Building Board
From: F. Keith Stepan
Date: February 4, 2004
Subject: **Amendments to Procurement Rules R23-1 and R23-2**

Recommendation:

DFCM recommends that the Board review and, if satisfied, approve the proposed amendments to DFCM's procurement rules for construction (R23-1) and architect-engineer services (R23-2).

Background:

As was discussed in the December 2003 Board meeting, a substantial review of DFCM's procedures for the procurement of construction and architect-engineer services was conducted last fall. The review committees included representatives of private construction and architect-engineer firms and associations along with legislators, Building Board members and DFCM staff. The recommendations from these committees were presented to the Board in December. The Board gave conceptual approval with the expectation that DFCM would return in a subsequent meeting with any amendments to its procurement rules that were necessary to implement the recommendations.

DFCM has reviewed its procurement rules and proposes the amendments noted in the attached documents. The full text of both rules is included to aid in understanding the context of the proposed amendments. Proposed new text is underscored. Text that is proposed to be deleted is bracketed and stricken through. A summary of the proposed amendments follows. Please note that the term used in the rule for the "low bid" method is "competitive sealed bidding" and the term used for the "Value Based Selection" (VBS) method is "competitive sealed proposals." These terms are used in order to be consistent with the procurement statutes that the rules implement.

Amendments to R23-1, Procurement of Construction

1. Standard Selection Methods – Amendments are proposed to state that the competitive sealed bidding method and the multi-step sealed bidding method are the standard procurement methods for construction that is accomplished through the design-bid-build method of construction contract management although the director may authorize the use of the competitive sealed proposals method when warranted by unique circumstances. Amendments are also proposed to state that the competitive sealed proposals method is the standard procurement method for the procurement of a construction manager under the construction manager/general contractor method of construction contract

management. The rule already required that the competitive sealed proposals method be used for procuring a design/build team. These amendments are contained in lines 52 through 66 on page 2 and lines 323 through 355 on pages 8 and 9.

2. Confidentiality of Past Performance and Reference Information – Amendments are proposed to clarify the confidentiality of this information. The proposed amendments clarify that the confidentiality extends to information related to past performance in addition to references. They also identify parties that may receive this information. These amendments are contained in lines 301 through 303 on page 7 and lines 401 through 413 on page 10.
3. Scoring of Proposals – Amendments are proposed on lines 466 through 470 on page 11 regarding the formal scoring of proposals in the selection process.
4. Selecting the Method of Construction Contracting – Amendments are proposed on lines 618 through 628 on page 15 to provide that the design-bid-build method is the standard construction contracting method for contracts under \$1,500,000 and construction manager/general contractor is the standard method for contracts over \$1,500,000. The director must document his approval of a contracting method that deviates from this guideline.
5. Descriptions of Construction Contracting Methods – Amendments are proposed on lines 637 through 684 on pages 15 and 16 to simplify and clarify the descriptions of construction contracting methods typically used by DFCM. This section is descriptive in nature and does not constrain DFCM from modifying the methods described or using alternative methods that are not described.
6. Other Technical Corrections and Clarifications – Several other amendments are proposed to provide technical corrections or clarifications throughout the rule. The most substantive of these amendments is the clarification that a modified competitive sealed proposals method may be used for small procurements that do not require a public notice. This amendment is contained in lines 511 through 515 on page 12.

Amendments to R23-2, Procurement of Architect-Engineer Services

1. Confidentiality of Past Performance and Reference Information – Amendments are proposed to clarify the confidentiality of this information. The proposed amendments clarify that the confidentiality extends to information related to past performance in addition to references. They also identify parties that may receive this information. These amendments are contained in lines 95 through 106 on page 3 and lines 146 through 153 on page 4.
2. Selection Criteria – Several amendments are proposed in lines 119 through 125 on page 3 to clarify the criteria to be used in selections.

3. Other Technical Corrections and Clarifications – Several other amendments are proposed to provide technical corrections or clarifications throughout the rule. None of these amendments make a substantive change in the rule.

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Attachment

**Proposed Amendments
January 23, 2004**

R23. Administrative Services, Facilities Construction and Management.

R23-1. Procurement of Construction.

R23-1-1. Purpose and Authority.

(1) In accordance with Subsection 63-56-14(2), this rule establishes procedures for the procurement of construction by the Division.

(2) The statutory provisions governing the procurement of construction by the Division are contained in Title 63, Chapter 56 and Title 63A, Chapter 5.

R23-1-2. Definitions.

(1) Except as otherwise stated in this rule, terms used in this rule are defined in Section 63-56-5.

(2) In addition:

(a) "Acceptable Bid Security" means a bid bond meeting the requirements of Subsection R23-1-40(4).

(b) "Board" means the State Building Board established pursuant to Section 63A-5-101.

(c) "Cost Data" means factual information concerning the cost of labor, material, overhead, and other cost elements which are expected to be incurred or which have been actually incurred by the contractor in performing the contract.

(d) "Director" means the Director of the Division, including, unless otherwise stated, his duly authorized designee.

(e) "Division" means the Division of Facilities Construction and Management established pursuant to Section 63A-5-201.

(f) "Established Market Price" means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources independent of the manufacturer or supplier.

(g) "Price Data" means factual information concerning prices for supplies, services, or construction substantially identical to those being procured. Prices in this definition refer to offered or proposed selling prices and includes data relevant to both prime and subcontract prices.

(h) "Procuring Agencies" means, individually or collectively, the state, the Division, the owner and the using agency.

(i) "Products" means and includes materials, systems and equipment.

(j) "Proprietary Specification" means a specification which uses a brand name to describe the standard of quality, performance, and other characteristics needed to meet the procuring agencies' requirements or which is written in such a manner that restricts the procurement to one brand.

(k) "Public Notice" means the notice that is publicized pursuant to this rule to notify contractors of Invitations For Bids and Requests For Proposals.

(l) "Specification" means any description of the physical, functional or performance characteristics of a supply or construction item. It may include requirements for inspecting, testing, or preparing a supply or construction item for delivery or use.

(m) "State" means the State of Utah.

(n) "Subcontractor" means any person who has a contract with any person other than the procuring agency to perform any portion of the work on a project.

(o) "Using Agency" means any state agency or any political subdivision of the state which utilizes any services or construction procured under these rules.

(p) "Work" means the furnishing of labor or materials, or both.

R23-1-5. Competitive Sealed Bidding.

(1) Use. Competitive sealed bidding, which includes multi-step sealed bidding, ~~[may]~~ shall be used for the procurement of construction if the design-bid-build method of construction contract management described in Subsection R23-1-45(5)(b) is used unless a determination is made by the Director in accordance with Subsection R23-1-115(1)(c) that the competitive sealed proposals procurement method should be used. [÷

~~(a) the contract is expected to cost \$250,000 or less;~~

~~(b) the contract is expected to cost more than \$250,000 but less than \$1,000,000 and the Director determines in writing that competitive sealed bidding is the most appropriate method for procuring the contract due to one or more of the following circumstances:~~

~~(i) the contract is predominantly for products or materials and it is not necessary to evaluate the features of the products or materials in the selection process; or~~

~~(ii) the contract is for work for which there is not a significant benefit derived from evaluating the past performance, project management plans or other qualification factors of the contractor; or~~

~~(c) the Director determines in writing that other unique and compelling factors exist causing it to be in the best interests of the procuring agencies to use the competitive sealed bidding method.]~~

(2) Public Notice of Invitations For Bids.

(a) Public notice of Invitations For Bids shall be publicized electronically on the Internet; and may be publicized in any or all of the following as determined appropriate:

(i) In a newspaper having general circulation in the area in which the project is located;

(ii) In appropriate trade publications;

(iii) In a newspaper having general circulation in the state;

(iv) By any other method determined appropriate.

(b) A copy of the public notice shall be available for public inspection at the principal office of the Division in Salt Lake City, Utah.

(3) Content of the Public Notice. The public notice of Invitation For Bids shall include the following:

(a) The closing time and date for the submission of bids;

(b) The location to which bids are to be delivered;

(c) Directions for obtaining the bidding documents;

(d) A brief description of the project;

(e) Notice of any mandatory pre-bid meetings.

(4) Bidding Time. Bidding time is the period of time between the date of the first publication of the public notice and the final date and time set for the receipt of bids by the Division.

Bidding time shall be set to provide bidders with reasonable time to prepare their bids and shall be not less than ten calendar days, unless a shorter time is deemed necessary for a particular project as determined in writing by the Director.

(5) Proposal Form. The bidding documents for an Invitation For Bids shall include a

proposal form having a space in which the bid prices shall be inserted and which the bidder shall sign and submit along with all other required documents and materials.

(6) Addenda to the Bidding Documents.

(a) Addenda shall be distributed or otherwise made available to all entities known to have obtained the bidding documents.

(b) Addenda shall be distributed or otherwise made available within a reasonable time to allow all prospective bidders to consider them in preparing bids. If the time set for the final receipt of bids will not permit appropriate consideration, the bidding time shall be extended to allow proper consideration of the addenda.

(7) Pre-Opening Modification or Withdrawal of Bids.

(a) Bids may be modified or withdrawn by the bidder by written notice delivered to the location designated in the public notice where bids are to be delivered prior to the time set for the opening of bids.

(b) Bid security, if any, shall be returned to the bidder when withdrawal of the bid is permitted.

(c) All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate project file.

(8) Late Bids, Late Withdrawals, and Late Modifications. Any bid, withdrawal of bid, or modification of bid received after the time and date set for the submission of bids at the location designated in the notice shall be deemed to be late and shall not be considered, unless it is the only bid received in which case it may be considered.

(9) Receipt, Opening, and Recording of Bids.

(a) Upon receipt, all bids and modifications shall be stored in a secure place until the time for bid opening.

(b) Bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time and place designated in the notice. The names of the bidders, the bid price, and other information deemed appropriate by the Director shall be read aloud or otherwise made available to the public. After the bid opening, the bids shall be tabulated or a bid abstract made. The opened bids shall be available for public inspection.

(10) Mistakes in Bids.

(a) If a mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of an inadvertent, nonjudgmental mistake is permissible but only at the discretion of the Director and only to the extent it is not contrary to the interest of the procuring agencies or the fair treatment of other bidders.

(b) When it appears from a review of the bid that a mistake may have been made, the Director may request the bidder to confirm the bid in writing. Situations in which confirmation may be requested include obvious, apparent errors on the face of the bid or a bid substantially lower than the other bids submitted.

(c) This subsection sets forth procedures to be applied in three situations described below in which mistakes in bids are discovered after opening but before award.

(i) Minor formalities are matters which, in the discretion of the Director, are of form rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders and with respect to which, in the Director's discretion, the effect on price, quantity, quality, delivery, or contractual conditions is not or will not be significant. The Director, in his sole discretion, may waive minor formalities or allow the bidder to

correct them depending on which is in the best interest of the procuring agencies. Examples include the failure of a bidder to:

(A) Sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound;

(B) Acknowledge receipt of any addenda to the Invitation For Bids, but only if it is clear from the bid that the bidder received the addenda and intended to be bound by its terms; the addenda involved had a negligible effect on price, quantity, quality, or delivery; or the bidder acknowledged receipt of the addenda at the bid opening.

(ii) If the Director determines that the mistake and the intended bid are clearly evident on the face of the bid document, the bid shall be corrected to the intended bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

(iii) A bidder may be permitted to withdraw a low bid if the Director determines a mistake is clearly evident on the face of the bid document but the intended amount of the bid is not similarly evident, or the bidder submits to the Division proof which, in the Director's judgment, demonstrates that a mistake was made.

(d) No bidder shall be allowed to correct a mistake or withdraw a bid because of a mistake discovered after award of the contract; provided, that mistakes of the types described in this Subsection (10) may be corrected or the award of the contract canceled if the Director determines that correction or cancellation will not prejudice the interests of the procuring agencies or fair competition.

(e) The Director shall approve or deny in writing all requests to correct or withdraw a bid.

(11) Bid Evaluation and Award. Except as provided in the following sentence, the contract is to be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the bidding documents and no bid shall be evaluated for any requirements or criteria that are not disclosed in the bidding documents. A reciprocal preference shall be granted to a resident contractor if the provisions of Section 63-56-20.6 are met.

(12) Cancellation of Invitations For Bids; Rejection Of Bids in Whole or In Part.

(a) Although issuance of an Invitation For Bids does not compel award of a contract, the Division may cancel an Invitation For Bids or reject bids received in whole or in part only when the Director determines that it is in the best interests of the procuring agencies to do so.

(b) The reasons for cancellation or rejection shall be made a part of the project file and available for public inspection.

(c) Any determination of nonresponsibility of a bidder or offeror shall be made by the Director in writing and shall be based upon the criteria that the Director shall establish as relevant to this determination with respect to the particular project. An unreasonable failure of the bidder or offeror to promptly supply information regarding responsibility may be grounds for a determination of nonresponsibility. Any bidder or offeror determined to be nonresponsible shall be provided with a copy of the written determination within a reasonable time. Information furnished by a bidder or offeror pursuant to any inquiry concerning responsibility shall be classified as a protected record pursuant to Section 63-2-304 and shall not be disclosed to the public by the Division without the prior written consent of the bidder or offeror.

(13) Tie Bids.

(a) Definition. Tie bids are low responsive bids from responsible bidders that are identical in price.

181 (b) Award. Award shall be determined through a coin toss or the drawing of lots as
182 determined by the Director. The coin toss or drawing of lots shall be open to the public, including
183 the bidders who submitted the tie bids.

184 (c) Record. Documentation of the tie bids and the procedure used to resolve the award of
185 the contract shall be placed in the contract file.

186 (14) Subcontractor Lists. For purposes of this Subsection (14), the definitions of Section
187 63A-5-208 shall be applicable. Within 24 hours after the bid opening time, not including Saturdays,
188 Sundays and state holidays, the apparent lowest three bidders, as well as other bidders that desire to
189 be considered, shall submit to the Division a list of their first-tier subcontractors that are in excess of
190 the dollar amounts stated in Subsection 63-A-5-208(3)(a).

191 (a) The subcontractor list shall include the following:

192 (i) the type of work the subcontractor is to perform;

193 (ii) the subcontractor's name;

194 (iii) the subcontractor's bid amount;

195 (iv) the license number of the subcontractor issued by the Utah Division of Occupational and
196 Professional Licensing, if such license is required under Utah law; and

197 (v) the impact that the selection of any alternate included in the solicitation would have on
198 the information required by this Subsection (14).

199 (b) The contract documents for a specific project may require that additional information be
200 provided regarding any contractor, subcontractor, or supplier.

201 (c) If pursuant to Subsection 63A-5-208(4), a bidder intends to perform the work of a
202 subcontractor or obtain, at a later date, a bid from a qualified subcontractor, the bidder shall:

203 (i) comply with the requirements of Section 63A-5-208 and

204 (ii) clearly list himself on the subcontractor list form.

205 (d) Errors on the subcontractor list will not disqualify the bidder if the bidder can
206 demonstrate that the error is a result of his reasonable reliance on information that was provided by
207 the subcontractor and was used to meet the requirements of this section, and, provided that this does
208 not result in an adjustment to the bidder's contract amount.

209 (e) Pursuant to Sections 63A-5-208 and 63-2-304, information contained in the
210 subcontractor list submitted to the Division shall be classified public except for the amount of
211 subcontractor bids which shall be classified as protected until a contract has been awarded to the
212 bidder at which time the subcontractor bid amounts shall be classified as public. During the time
213 that the subcontractor bids are classified protected, they may only be made available to procurement
214 and other officials involved with the review and approval of bids.

215 (15) Change of Listed Subcontractors. Subsequent to twenty-four hours after the bid
216 opening, the contractor may change his listed subcontractors only after receiving written permission
217 from the Director based on complying with all of the following:

218 (a) The contractor has established in writing that the change is in the best interest of the
219 State and that the contractor establishes an appropriate reason for the change, which may include,
220 but is not limited to, the following reasons:

221 (i) the original subcontractor has failed to perform, or is not qualified or capable of
222 performing,

223 (ii) the subcontractor has requested in writing to be released;

224 (b) The circumstances related to the request for the change do not indicate any bad faith in
225 the original listing of the subcontractors;

(c) Any requirement set forth by the Director to ensure that the process used to select a new subcontractor does not give rise to bid shopping;

(d) Any increase in the cost of the subject subcontractor work shall be borne by the contractor; and

(e) Any decrease in the cost of the subject subcontractor work shall result in a deductive change order being issued for the contract for such decreased amount.

R23-1-10. Multi-Step Sealed Bidding.

(1) Description. Multi-step sealed bidding is a two-phase process. In the first phase bidders submit unpriced technical offers to be evaluated. In the second phase, bids submitted by bidders whose technical offers are determined to be acceptable during the first phase are considered. It is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtain the benefits of the competitive sealed proposals procedure through the solicitation of technical offers and the conduct of discussions to arrive at technical offers and terms acceptable to the Division and suitable for competitive pricing.

(2) Use. The multi-step sealed bidding method may be used when the Director deems it to the advantage of the state. Multi-step sealed bidding may be used when it is considered desirable:

(a) to invite and evaluate technical offers or statements of qualifications to determine their acceptability to fulfill the purchase description requirements;

(b) to conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;

(c) to accomplish (a) or (b) prior to soliciting bids; and

(d) to award the contract to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding procedures.

(3) Pre-Bid Conferences In Multi-Step Sealed Bidding. The Division may hold one or more pre-bid conferences prior to the submission of unpriced technical offers or at any time during the evaluation of the unpriced technical offers.

(4) Procedure for Phase One of Multi-Step Sealed Bidding.

(a) Public Notice. Multi-step sealed bidding shall be initiated by the issuance of a Public Notice in the form required by Subsections R23-1-5(2) and (3).

(b) Invitation for Bids. The multi-step Invitation for Bids shall state:

(i) that unpriced technical offers are requested;

(ii) when bids are to be submitted (if they are to be submitted at the same time as the unpriced technical offers, the bids shall be submitted in a separate sealed envelope);

(iii) that it is a multi-step sealed bid procurement, and bids will be considered only in the second phase and only from those bidders whose unpriced technical offers are found acceptable in the first phase;

(iv) the criteria to be used in the evaluation of the unpriced technical offers;

(v) that the Division, to the extent the Director finds necessary, may conduct oral or written discussions of the unpriced technical offers;

(vi) that the item being procured shall be furnished in accordance with the bidders technical offer as found to be finally acceptable and shall meet the requirements of the Invitation for Bids; and

(vii) that bidders may designate those portions of the unpriced technical offers which contain trade secrets or other proprietary data which are to remain confidential. If the bidder selected for

award has requested in writing the non-disclosure of trade secrets and other proprietary data so identified, the Director shall examine the request to determine its validity prior to award of the contract. If the parties do not agree as to the disclosure of data in the contract, the Director shall inform the bidder in writing what portion of the offer will be disclosed and that, unless the bidder withdraws the offer, it will be disclosed.

(c) Amendments to the Invitation for Bids. After receipt of unpriced technical offers, amendments to the Invitation for Bids shall be distributed only to bidders who submitted unpriced technical offers and they shall be allowed to submit new unpriced technical offers or to amend those submitted. If, in the opinion of the Director, a contemplated amendment will significantly change the nature of the procurement, the Invitation for Bids shall be canceled in accordance with Subsection R23-1-5(12) and a new Invitation for Bids may be issued.

(d) Receipt and Handling of Unpriced Technical Offers. After the date and time established for the receipt of unpriced technical offers, a register of bidders shall be open to public inspection. Prior to award, unpriced technical offers shall be shown only to those involved with the evaluation of the offers. The unpriced technical offer of the successful bidder shall be open to public inspection for a period of 90 days after award of the contract. Unpriced technical offers of bidders who are not awarded contracts shall not be open to public inspection.

(e) Evaluation of Unpriced Technical Offers. The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for Bids which may include an evaluation of the past performance of the bidder. The unpriced technical offers shall be categorized as acceptable or unacceptable. The Director shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file.

(f) Discussion of Unpriced Technical Offers. Discussion of technical offers may be conducted with bidders who submit an acceptable technical offer. During the course of discussions, any information derived from one unpriced technical offer shall not be disclosed to any other bidder. Once discussions are begun, any bidder who has not been notified that its offer has been found unacceptable may submit supplemental information modifying or otherwise amending its technical offer until the closing date established by the Director. Submission may be made at the request of the Director or upon the bidder's own initiative.

(g) Notice of Unacceptable Unpriced Technical Offer. When the Director determines a bidder's unpriced technical offer to be unacceptable, he shall notify the bidder in writing. Such bidders shall not be afforded an additional opportunity to supplement technical offers.

(h) Confidentiality of Past Performance and Reference Information. Confidentiality of past performance and reference information shall be maintained in accordance with Subsection R23-1-15(10).

(5) Mistakes During Multi-Step Sealed Bidding. Mistakes may be corrected or bids may be withdrawn during phase one:

- (a) before unpriced technical offers are considered;
- (b) after any discussions have commenced under Subsection R23-1-10(4)(f); or
- (c) when responding to any amendment of the Invitation for Bids. Otherwise mistakes may be corrected or withdrawal permitted in accordance with Subsection R23-1-5(10).

(6) Carrying Out Phase Two.

(a) Initiation. Upon the completion of phase one, the Director shall either:

- (i) open bids submitted in phase one (if bids were required to be submitted) from bidders whose unpriced technical offers were found to be acceptable; provided, however, that the offers have

remained unchanged, and the Invitation for Bids has not been amended subsequent to the submittal of bids; or

(ii) invite each acceptable bidder to submit a bid.

(b) Conduct. Phase two is to be conducted as any other competitive sealed bid procurement except:

(i) as specifically set forth in Section R23-1-10; and

(ii) no public notice is given of this invitation to submit.

R23-1-15. Competitive Sealed Proposals.

(1) Use. ~~[Except as specifically provided for elsewhere in this rule, the Division shall procure construction through the use of competitive sealed proposals. After consideration of the following factors, the Board and Director determine that the use of competitive sealed proposals is generally more advantageous to the state than competitive sealed bidding for the procurement of construction by the Division.~~

~~(a) The Division's experience with competitive sealed bidding and competitive sealed proposals indicates that construction contracts procured under the competitive sealed proposal method tend to have a lower level of change orders while being more likely to be completed on time;~~

~~(b) There is a need to consider other factors such as the skills, experience, and past performance of contractors in addition to the initial cost reflected in the bid amount; and~~

~~(c) It is in the best interests of the state to select the proposal which provides the best value to the procuring agencies after giving due consideration to qualifications, past performance, management plans, cost, and other factors applicable to the project.~~

~~(d) Notwithstanding the above, the procurement of the types of contracts described in Subsection R23-1-5(1) may not warrant the additional effort required for the competitive sealed proposal method.~~

~~(2)]~~

(a) Construction Management. The competitive sealed proposals procurement method shall be used in the procurement of a construction manager under the construction manager/general contractor method of construction contract management described in subsection R23-1-45(5)(d) due to the need to consider qualifications, past performance and services offered in addition to the cost of the services and because only a small portion of the ultimate construction cost is typically considered in this selection.

(b) Design-Build. In order to meet the requirements of Section 63-56-43.1, competitive sealed proposals shall be used to procure design-build contracts.

(c) Design-Bid-Build. The competitive sealed proposals procurement method may be used for procuring a contractor under the design-bid-build method of construction contract management described in subsection R23-1-45(5)(b) only after the Director makes a determination that it is in the best interests of the state to use the competitive sealed proposals method due to unique aspects of the project that warrant the consideration of qualifications, past performance, schedule or other factors in addition to cost.

(2) Documentation. The Director's determination made under subsection R23-1-15(1)(c) shall be documented in writing and retained in the project file.

(3) Public Notice.

(a) Public notice of the Request for Proposals shall be publicized in the same manner provided for giving public notice of an Invitation for Bids, as provided in Subsection R23-1-5(2).

(b) The public notice shall include:

- (i) a brief description of the project;
- (ii) directions on how to obtain the Request for Proposal documents;
- (iii) notice of any mandatory pre-proposal meetings; and
- (iv) the closing date and time by which the first submittal of information is required;

(4) Proposal Preparation Time. Proposal preparation time is the period of time between the date of first publication of the public notice and the date and time set for the receipt of proposals by the Division. In each case, the proposal preparation time shall be set to provide offerors a reasonable time to prepare their proposals. The time between the first publication of the public notice and the earlier of the first required submittal of information or any mandatory pre-proposal meeting shall be not less than ten calendar days, unless a shorter time is deemed necessary for a particular procurement as determined, in writing, by the Director.

(5) Form of Proposal. The Request for Proposals may state the manner in which proposals are to be submitted, including any forms for that purpose.

(6) Addenda to Requests for Proposals. Addenda to the requests for proposals may be made in the same manner provided for addenda to the bidding documents in connection with Invitations for Bids set forth in Subsection R23-1-5(6) except that addenda may be issued to qualified offerors until the deadline for best and final offers.

(7) Modification or Withdrawal of Proposals.

- (a) Proposals may be modified prior to the due dates established in the Request for Proposals.
- (b) Proposals may be withdrawn until the notice of selection is issued.

(8) Late Proposals, and Late Modifications. Except for modifications allowed pursuant to negotiation, any proposal, or modification received at the location designated for receipt of proposals after the due dates established in the Request for Proposals shall be deemed to be late and shall not be considered unless there are no other offerors.

(9) Receipt and Registration of Proposals.

- (a) After the date established for the first receipt of proposals or other required information, a register of offerors shall be prepared and open to public inspection. Prior to award, proposals and modifications shall be shown only to procurement and other officials involved with the review and selection of proposals.
- (b) Except as provided in this rule, proposals of the successful offeror shall be open to public inspection after award of the contract. Proposals of offerors who are not awarded contracts shall not be open to public inspection although the amount of each offeror's cost proposal shall be disclosed after the contract is awarded.

(c) The Request for Proposals may provide that certain information required to be submitted by the offeror shall be considered confidential and classified as protected if such information meets the provisions of Section 63-2-304 of the Government Records Access and Management Act.

(d) If the offeror selected for award has requested in writing the non-disclosure of trade secrets and other proprietary data so identified, the Director shall examine the request to determine its validity prior to award of the contract. If the parties do not agree as to the disclosure of data in the contract, the Director shall inform the offeror in writing what portion of the proposal will be disclosed and that, unless the offeror withdraws the proposal, it will be disclosed.

(10) Confidentiality of Past Performance and Reference Information. The Board finds that it is necessary to maintain the confidentiality of ~~[individual responses from persons who are contacted~~

~~as references]~~ past performance and reference information in order to avoid competitive injury and to encourage those persons providing the information to respond in an open and honest manner without fear of retribution. Accordingly, ~~[responses to requests for references are]~~ records containing past performance and reference information are classified as protected records under the provisions of Subsections 63-2-304(2) and (6) and shall be disclosed only ~~[in summary form]~~ to those persons involved with the performance evaluation, the contractor that the information addresses and procurement and other officials involved with the review and selection of proposals. The Division may, however, provide reference information to other governmental entities for use in their procurement activities and to other parties when requested by the contractor that is the subject of the information. ~~[This Subsection (10) applies only to responses from references submitted by the offeror.]~~

(11) Evaluation of Proposals.

(a) The evaluation of proposals shall be conducted by an evaluation committee appointed by the Director that may include representatives of the Division, the Board, other procuring agencies, and contractors, architects, engineers, and others of the general public. Each member of the selection committee shall certify as to his lack of conflicts of interest.

(b) The Request for Proposals shall state all of the evaluation factors and the relative importance of price and other evaluation factors.

(c) The evaluation shall be based on the evaluation factors set forth in the request for proposals. Numerical rating systems may be used but are not required. Factors not specified in the request for proposals shall not be considered.

(d) Proposals may be initially classified as potentially acceptable or unacceptable. Offerors whose proposals are unacceptable shall be so notified by the Director in writing and they may not continue to participate in the selection process.

(e) This classification of proposals may occur at any time during the selection process once sufficient information is received to consider the potential acceptability of the offeror.

(f) The request for proposals may provide for a limited number of offerors who may be classified as potentially acceptable. In this case, the offerors considered to be most acceptable, up to the number of offerors allowed, shall be considered acceptable.

(12) Proposal Discussions with Individual Offerors.

(a) Unless only one proposal is received, proposal discussions with individual offerors, if held, shall be conducted with no less than the offerors submitting the two best proposals.

(b) Discussions are held to:

(i) Promote understanding of the procuring agency's requirements and the offerors' proposals; and

(ii) Facilitate arriving at a contract that will be most advantageous to the procuring agencies taking into consideration price and the other evaluation factors set forth in the request for proposals.

(c) Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors. Any oral clarification or change of a proposal shall be reduced to writing by the offeror.

(13) Best and Final Offers. If utilized, the Director shall establish a common time and date to submit best and final offers. Best and final offers shall be submitted only once unless the Director makes a written determination before each subsequent round of best and final offers demonstrating that another round is in the best interest of the procuring agencies and additional discussions will be

conducted or the procuring agencies' requirements may be changed. Otherwise, no discussion of, or changes in, the best and final offers shall be allowed prior to award. Offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be construed as their best and final offer.

(14) Mistakes in Proposals.

(a) Mistakes discovered before the established due date. An offeror may correct mistakes discovered before the time and date established in the Request for Proposals for receipt of that information by withdrawing or correcting the proposal as provided in Subsection R23-1-15(7).

(b) Confirmation of proposal. When it appears from a review of the proposal before award that a mistake has been made, the offeror may be asked to confirm the proposal. Situations in which confirmation may be requested include obvious, apparent errors on the face of the proposal or a proposal amount that is substantially lower than the other proposals submitted. If the offeror alleges mistake, the proposal may be corrected or withdrawn as provided for in this section.

(c) Minor formalities. Minor formalities, unless otherwise corrected by an offeror as provided in this section, shall be treated as they are under Subsection R23-1-5(10)(c).

(c) Mistakes discovered after award. Offeror shall be bound to all terms, conditions and statements in offeror's proposal after award of the contract.

(15) Award.

(a) Award Documentation. A written determination shall be made showing the basis on which the award was found to be most advantageous to the state based on the evaluation factors set forth in the Request for Proposals. This requirement may be satisfied through documentation of a scoring of the proposals based on the evaluation factors and associated points as identified in the Request for Proposals.

(b) One proposal received. If only one proposal is received in response to a Request for Proposals, the Director may, as he deems appropriate, make an award or resolicit for the purpose of obtaining additional competitive sealed proposals.

(16) Publicizing Awards. After a contract is entered into, notice of award shall be available in the principal office of the Division in Salt Lake City, Utah.

R23-1-17. Bids Over Budget.

(1) In the event all bids for a construction project exceed available funds as certified by the appropriate fiscal officer, and the low responsive and responsible bid does not exceed those funds by more than 5%, the Director may, where time or economic considerations preclude resolicitation of work of a reduced scope, negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder in order to bring the bid within the amount of available funds.

(2) As an alternative to the procedure authorized in Subsection (1), when all bids for a construction project exceed available funds as certified by the Director, and the Director finds that due to time or economic considerations the re-solicitation of a reduced scope of work would not be in the interest of the state, the Director may negotiate an adjustment in the bid price using one of the following methods:

(a) reducing the scope of work in specific subcontract areas and supervising the re-bid of those subcontracts by the low responsive and responsible bidder;

(b) negotiating with the low responsive and responsible bidder for a reduction in scope and cost with the value of those reductions validated in accordance with Section R23-1-50; or

(c) revising the contract documents and soliciting new bids only from bidders who submitted a responsive bid on the original solicitation. This re-solicitation may have a shorter bid response time than otherwise required.

(3) The use of one of the alternative procedures provided for in this subsection (2) must provide for the fair and equitable treatment of bidders.

(4) The Director's written determination, including a brief explanation of the basis for the decision shall be included in the contact file.

(5) This section does not restrict in any way, the right of the Director to use any emergency or sole source procurement provisions, or any other applicable provisions of State law or rule which may be used to award the construction project.

R23-1-20. Small Purchases.

(1) Procurements of \$50,000 or Less.

(a) The Director may make procurements of construction estimated to cost \$50,000 or less by soliciting at least two firms to submit written quotations. The award shall be made to the ~~[person]~~ firm offering the lowest acceptable quotation.

(b) The names of the persons submitting quotations and the date and amount of each quotation shall be recorded and maintained as a public record by the Division.

(c) If the Director determines that other factors in addition to cost should be considered in a procurement of construction estimated to cost \$50,000 or less, the Director shall solicit proposals from at least two firms. The award shall be made to the firm offering the best proposal as determined through application of the procedures provided for in Section R23-1-15 except that a public notice is not required and only invited firms may submit proposals.

(2) Procurements of \$5,000 or Less. The Director may make small purchases of construction of \$5,000 or less in any manner that he shall deem to be adequate and reasonable.

(3) Division of Procurements. Procurements shall not be divided in order to qualify for the procedures outlined in this section.

R23-1-25. Sole Source Procurement.

(1) Conditions for Use of Sole Source Procurement.

The procedures concerning sole source procurement in this Section may be used if, in the discretion of the Director, a requirement is reasonably available only from a single source. Examples of circumstances which could also necessitate sole source procurement are:

(a) where the compatibility of product design, equipment, accessories, or replacement parts is the paramount consideration;

(b) where a sole supplier's item is needed for trial use or testing;

(c) procurement of public utility services;

(d) when it is a condition of a donation that will fund the full cost of the supply, material, equipment, service, or construction item.

(2) Written Determination. The determination as to whether a procurement shall be made as a sole source shall be made by the Director in writing and may cover more than one procurement. In cases of reasonable doubt, competition shall be solicited.

(3) Negotiation in Sole Source Procurement. The Director shall negotiate with the sole source vendor for considerations of price, delivery, and other terms.

541 **R23-1-30. Emergency Procurements.**

542 (1) Application. This section shall apply to every procurement of construction made under
543 emergency conditions that will not permit other source selection methods to be used.

544 (2) Definition of Emergency Conditions. An emergency condition is a situation which
545 creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics,
546 riots, natural disasters, wars, destruction of property, building or equipment failures, or any
547 emergency proclaimed by governmental authorities.

548 (3) Scope of Emergency Procurements. Emergency procurements shall be limited to only
549 those construction items necessary to meet the emergency.

550 (4) Authority to Make Emergency Procurements.

551 (a) The Division makes emergency procurements of construction when, in the Director's
552 determination, an emergency condition exists or will exist and the need cannot be met through other
553 procurement methods.

554 (b) The procurement process shall be considered unsuccessful when all bids or proposals
555 received pursuant to an Invitation For Bids or Request For Proposals are nonresponsive,
556 unreasonable, noncompetitive, or exceed available funds as certified by the appropriate fiscal officer,
557 and time or other circumstances will not permit the delay required to resolicit competitive sealed
558 bids or proposals. If emergency conditions exist after or are brought about by an unsuccessful
559 procurement process, an emergency procurement may be made.

560 (5) Source Selection Methods. The source selection method used for emergency
561 procurement shall be selected by the Director with a view to assuring that the required services of
562 construction items are procured in time to meet the emergency. Given this constraint, as much
563 competition as the Director determines to be practicable shall be obtained.

564 (6) Specifications. The Director may use any appropriate specifications without being
565 subject to the requirements of Section R23-1-55.

566 (7) Required Construction Contract Clauses. The Director may modify or not use the
567 construction contract clauses otherwise required by Section R23-1-60.

568 (8) Written Determination. The Director shall make a written determination stating the basis
569 for each emergency procurement and for the selection of the particular source. This determination
570 shall be included in the project file.

571
572 **R23-1-35. Qualifications of Contractors.**

573 (1) Project Specific Requirements. The Division may include qualification requirements in
574 the bidding documents as appropriate for that specific project.

575
576 **R23-1-40. Acceptable Bid Security; Performance and Payment Bonds.**

577 (1) Application. This section shall govern bonding and bid security requirements for the
578 award of construction contracts by the Division in excess of \$50,000; although the Division may
579 require acceptable bid security and performance and payment bonds on smaller contracts. Bidding
580 Documents shall state whether acceptable bid security, performance bonds or payment bonds are
581 required.

582 (2) Acceptable Bid Security.

583 (a) Invitations for Bids and Requests For Proposals shall require the submission of
584 acceptable bid security in an amount equal to at least five percent of the bid, at the time the bid is
585 submitted. If a contractor fails to accompany its bid with acceptable bid security, the bid shall be

deemed nonresponsive, unless this failure is found to be nonsubstantial as hereinafter provided.

(b) If acceptable bid security is not furnished, the bid shall be rejected as nonresponsive, unless the failure to comply is determined by the Director to be nonsubstantial. Failure to submit an acceptable bid security may be deemed nonsubstantial if:

(i)(A) the bid security is submitted on a form other than the Division's required bid bond form and the bid security meets all other requirements including being issued by a surety meeting the requirements of Subsection (5); and

(B) the contractor provides acceptable bid security by the close of business of the next succeeding business day after the Division notified the contractor of the defective bid security; or

(ii) only one bid is received.

(3) Payment and Performance Bonds. Payment and performance bonds in the amount of 100% of the contract price are required for all contracts in excess of \$50,000. These bonds shall cover the procuring agencies and be delivered by the contractor to the Division at the same time the contract is executed. If a contractor fails to deliver the required bonds, the contractor's bid shall be found nonresponsive and its bid security shall be forfeited.

(4) Forms of Bonds. Bid Bonds, Payment Bonds and Performance Bonds must be from sureties meeting the requirements of Subsection (5) and must be on the exact bond forms most recently adopted by the Board and on file with the Division.

(5) Surety firm requirements. All surety firms must be authorized to do business in the State of Utah and be listed in the U.S. Department of the Treasury Circular 570, Companies Holding Certificates of Authority as Acceptable Securities on Federal Bonds and as Acceptable Reinsuring Companies for an amount not less than the amount of the bond to be issued. A cosurety may be utilized to satisfy this requirement.

(6) Waiver. The Director may waive the bonding requirement if the Director finds, in writing, that bonds cannot be reasonably obtained for the work involved.

R23-1-45. Methods of Construction Contract Management.

(1) Application. This section contains provisions applicable to the selection of the appropriate type of construction contract management.

(2) Flexibility. The Director shall have sufficient flexibility in formulating the construction contract management method for a particular project to fulfill the needs of the procuring agencies. In each instance consideration commensurate with the project's size and importance should be given to all the appropriate and effective means of obtaining both the design and construction of the project. The methods for achieving the purposes set forth in this rule are not to be construed as an exclusive list.

(3) Selecting the Method of Construction Contracting. In selecting the construction contracting method, the Director shall consider the results achieved on similar projects in the past, the methods used, and other appropriate and effective methods and how they might be adapted or combined to fulfill the needs of the procuring agencies. The use of the ~~[single prime contractor]~~ design-bid-build method [in conjunction with the sequential design and construction approach] is an appropriate contracting method for the majority of construction contracts entered into by the Division with a cost equal to or less than \$1,500,000 and the construction manager/general contractor method is an appropriate contracting method for the majority of construction contracts entered into by the Division with a cost greater than \$1,500,000. The Director shall include a statement in the project file setting forth the basis for using any ~~other~~ construction contracting

method other than those suggested in the preceding sentence.

(4) Criteria for Selecting Construction Contracting Methods. Before choosing the construction contracting method to use, the Director shall consider the factors outlined in Subsection 63-56-36(1)(c).

(5) General Descriptions.

(a) Application of Descriptions. The following descriptions are provided for the more common contracting methods. The methods described are not all mutually exclusive and may be combined on a project. These descriptions are not intended to be fixed for all construction projects of the State. In each project, these descriptions may be adapted to fit the circumstances of that project.

(b) ~~[Single Prime Contractor. The single prime contractor]~~ Design-Bid-Build. The design-bid-build method is typified by one business, acting as a general contractor, contracting with the state to complete ~~[an entire]~~ a construction project in accordance with drawings and specifications provided by the state within a defined time period. Generally the drawings and specifications are prepared by an architectural or engineering firm under contract with the state. Further, while the general contractor may take responsibility for successful completion of the project, much of the work may be performed by specialty contractors with whom the prime contractor has entered into subcontracts.

(c) ~~[Multiple Prime Contractors. Under the multiple prime contractor method, the Division contracts directly with a number of specialty contractors to complete portions of the project in accordance with the Division's drawings and specifications. The Division may have primary responsibility for successful completion of the entire project, or the contracts may provide that one of the multiple prime contractors has this responsibility.~~

~~(d)~~ Design-Build. In a design-build project, a business contracts directly with the Division to meet requirements described in a set of performance specifications. The design-build contractor is responsible for both design and construction. This method can include instances where the design-build contractor supplies the site as part of the package.

(e) Construction Manager/General Contractor. A construction manager/general contractor is a ~~[person]~~ firm experienced in construction that ~~[has the ability]~~ provides professional services to evaluate and to implement drawings and specifications as they affect time, cost, and quality of construction and the ability to coordinate the construction of the project, including the administration of change orders. The Division may contract with the construction manager/general contractor early in a project to assist in the development of a cost effective design. The construction manager/general contractor will generally become the general contractor for the project and procure subcontract work at a later date. ~~[may become the single prime contractor, or may guarantee that the project will be completed on time and will not exceed a specified maximum price. This method is frequently used on fast track projects with the construction manager obtaining subcontractors through the issuance of multiple bid packages as the design is developed. A Construction Manager, including a Construction Manager/General Contractor, shall be selected using one of the source selection methods provided for in Sections 63-56-20 through 63-56-35.8.]~~ The procurement of a construction manager/general contractor may be based, among other criteria, on proposals for a management fee which is either a lump sum or a percentage of construction costs with a guaranteed maximum cost. If the design is sufficiently developed prior to the selection of a construction manager/general contractor, the procurement may be based on proposals for a lump sum or guaranteed maximum cost for the construction of the project. The contract with the construction

manager/general contractor may provide for a sharing of any savings which are achieved below the guaranteed maximum cost. When entering into any subcontract that was not specifically included in the Construction Manager/General Contractor's cost proposal submitted in the original procurement of the Construction Manager/General Contractor's services, the Construction Manager/General Contractor shall procure that subcontractor by using one of the source selection methods provided for in Sections 63-56-20 through 63-56-35.8 in [~~the same~~] a similar manner as if the subcontract work was procured directly by the Division.

~~[(f) Sequential Design and Construction. Sequential design and construction denotes a method in which design of substantially the entire structure is completed prior to beginning the construction process.~~

~~[(g) Phased Design and Construction. Phased design and construction denotes a method in which construction is begun when appropriate portions have been designed but before design of the entire structure has been completed. This method is also known as fast track construction.]~~

R23-1-50. Cost or Pricing Data and Analysis; Audits.

(1) Applicability. Cost or pricing data shall be required when negotiating contracts and adjustments to contracts if:

- (a) adequate price competition is not obtained as provided in Subsection (2); and
- (b) the amounts set forth in Subsection (3) are exceeded.

(2) Adequate Price Competition. Adequate price competition is achieved for portions of contracts or entire contracts when one of the following is met:

- (a) When a contract is awarded based on competitive sealed bidding;
- (b) When a contractor is selected from competitive sealed proposals and cost was one of the selection criteria;
- (c) For that portion of a contract that is for a lump sum amount or a fixed percentage of other costs when the contractor was selected from competitive sealed proposals and the cost of the lump sum or percentage amount was one of the selection criteria;
- (d) For that portion of a contract for which adequate price competition was not otherwise obtained when competitive bids were obtained and documented by either the Division or the contractor;
- (e) When costs are based upon established catalogue or market prices;
- (f) When costs are set by law or rule;
- (g) When the Director makes a written determination that other circumstances have resulted in adequate price competition.

(3) Amounts. This section does not apply to:

- (a) Contracts or portions of contracts costing less than \$100,000, and
- (b) Change orders and other price adjustments of less than \$25,000.

(4) Other Applications. The Director may apply the requirements of this section to any contract or price adjustment when he determines that it would be in the best interest of the state.

(5) Submission of Cost or Pricing Data and Certification. When cost or pricing data is required, the data shall be submitted prior to beginning price negotiation. The offeror or contractor shall keep the data current throughout the negotiations certify as soon as practicable after agreement is reached on price that the cost or pricing data submitted are accurate, complete, and current as of a mutually determined date.

(6) Refusal to Submit. If the offeror refuses to submit the required data, the Director shall

determine in writing whether to disqualify the noncomplying offeror, to defer award pending further investigation, or to enter into the contract. If a contractor refuses to submit the required data to support a price adjustment, the Director shall determine in writing whether to further investigate the price adjustment, to not allow any price adjustment, or to set the amount of the price adjustment.

(7) Defective Cost or Pricing Data. If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, the Division shall be entitled to an adjustment of the contract price to exclude any significant sum, including profit or fee, to the extent the contract sum was increased because of the defective data. It is assumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee; therefore, unless there is a clear indication that the defective data were not used or relied upon, the price should be reduced by this amount. In establishing that the defective data caused an increase in the contract price, the Director shall not be required to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the correct data had been submitted at the time of agreement on price.

(8) Audit. The Director may, at his discretion, and at reasonable times and places, audit or cause to be audited the books and records of a contractor, prospective contractor, subcontractor, or prospective subcontractor which are related to the cost or pricing data submitted.

(9) Retention of Books and Records. Any contractor who receives a contract or price adjustment for which cost or pricing data is required shall maintain all books and records that relate to the cost or pricing data for three years from the date of final payment under the contract. This requirement shall also extend to any subcontractors of the contractor.

R23-1-55. Specifications.

(1) General Provisions.

(a) Purpose. The purpose of a specification is to serve as a basis for obtaining a supply or construction item adequate and suitable for the procuring agencies' needs and the requirements of the project, in a cost-effective manner, taking into account, the costs of ownership and operation as well as initial acquisition costs. Specifications shall permit maximum practicable competition consistent with this purpose. Specifications shall be drafted with the objective of clearly describing the procuring agencies' requirements.

(b) Preference for Commercially Available Products. Recognized, commercially-available products shall be procured wherever practicable. In developing specifications, accepted commercial standards shall be used and unique products shall be avoided, to the extent practicable.

(c) Nonrestrictiveness Requirements. All specifications shall be written in such a manner as to describe the requirements to be met, without having the effect of exclusively requiring a proprietary supply, or construction item, or procurement from a sole source, unless no other manner of description will suffice. In that event, a written determination shall be made that it is not practicable to use a less restrictive specification.

(2) Director's Responsibilities.

(a) The Director is responsible for the preparation of all specifications.

(b) The Division may enter into contracts with others to prepare construction specifications when there will not be a substantial conflict of interest. The Director shall retain the authority to approve all specifications.

(c) Whenever specifications are prepared by persons other than Division personnel, the

contract for the preparation of specifications shall require the specification writer to adhere to the requirements of this section.

(3) Types of Specifications. The Director may use any method of specifying construction items which he considers to be in the best interest of the state including the following:

(a) By a performance specification stating the results to be achieved with the contractor choosing the means.

(b) By a prescriptive specification describing a means for achieving desired, but normally unstated, ends. Prescriptive specifications include the following:

(i) Descriptive specifications, providing a detailed written description of the required properties of a product and the workmanship required to fabricate, erect and install without using trade names; or

(ii) Proprietary specifications, identifying the desired product by using manufacturers, brand names, model or type designation or important characteristics. This is further divided into two classes:

(A) Sole Source, where a rigid standard is specified and there are no allowed substitutions due to the nature of the conditions to be met. This may only be used when very restrictive standards are necessary and there is only one proprietary product known that will meet the rigid standards needed. A sole source proprietary specification must be approved by the Director.

(B) Or Equal, which allows substitutions if properly approved.

(c) By a reference standard specification where documents or publications are incorporated by reference as though included in their entirety.

(d) By a nonrestrictive specification which may describe elements of prescriptive or performance specifications, or both, in order to describe the end result, thereby giving the contractor latitude in methods, materials, delivery, conditions, cost or other characteristics or considerations to be satisfied.

(4) Procedures for the Development of Specifications.

(a) Specifications may designate alternate supplies or construction items where two or more design, functional, or proprietary performance criteria will satisfactorily meet the procuring agencies' requirements.

(b) The specification shall contain a nontechnical section to include any solicitation or contract term or condition such as a requirement for the time and place of bid opening, time of delivery, payment, liquidated damages, and similar contract matters.

(c) Use of Proprietary Specifications.

(i) The Director shall seek to designate three brands as a standard reference and shall state that substantially equivalent products to those designated will be considered for award, with particular conditions of approval being described in the specification.

(ii) Unless the Director determines that the essential characteristics of the brand names included in the proprietary specifications are commonly known in the industry or trade, proprietary specifications shall include a description of the particular design, functional, or performance characteristics which are required.

(iii) Where a proprietary specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

(iv) The Division shall solicit sources to achieve whatever degree of competition is practicable. If only one source can supply the requirement, the procurement shall be made in

accordance with Section R23-1-25.

R23-1-60. Construction Contract Clauses.

(1) Required Contract Clauses. Pursuant to Section 63-56-40, the document entitled "Required Construction Contract Clauses", dated January 28, 2002 and on file with the Division, is hereby incorporated by reference. Except as provided in Subsections R23-1-30(7) and R23-1-60(2), the Division shall include these clauses in all construction contracts for more than \$50,000.

(2) Revisions to Contract Clauses. The clauses required by this section may be modified for use in any particular contract when, pursuant to Subsection 63-56-40(5), the Director makes a written determination describing the circumstances justifying the variation or variations. Notice of any material variations from the contract clauses required by this section shall be included in any invitation for bids or request for proposals.

KEY: contracts, public buildings, procurement

May 3, 2002

Notice of Continuation June 6, 2002

63A-5-103 et seq.

63-56-14(2)

63-56-20(7)

**Proposed Amendments
January 23, 2004**

R23. Administrative Services, Facilities Construction and Management.

R23-2. Procurement of Architect-Engineer Services.

R23-2-1. Purpose and Authority.

(1) In accordance with Subsection 63-56-14(2), this rule establishes procedures for the procurement of architect-engineer services by the Division.

(2) The statutory provisions governing the procurement of architect-engineer services by the Division are contained in Title 63, Chapter 56 and Title 63A, Chapter 5.

R23-2-2. Definitions.

(1) Except as otherwise stated in this rule, terms used in this rule are defined in Section 63-56-5.

(2) The following additional terms are defined for this rule.

(a) "Board" means the State Building Board established pursuant to Section 63A-5-101.

(b) "Director" means the Director of the Division, including, unless otherwise stated, his duly authorized designee.

(c) "Division" means the Division of Facilities Construction and Management established pursuant to Section 63A-5-201.

(d) "Public Notice" means the notice that is publicized pursuant to this rule to notify architects and engineers of Solicitations.

(e) "Solicitations" means all documents, whether attached or incorporated by reference, used for soliciting information from architects and engineers seeking to provide architect-engineer services to the Division.

(f) "State" means the State of Utah.

(g) "Using Agency" means any state agency or any political subdivision of the state which utilizes the services procured under this rule.

R23-2-3. Register of Architectural/Engineering Firms.

(1) Architects and engineers interested in being considered for architect-engineer services procured by the Division under Section R23-2-19 may submit an annual statement of qualifications and performance data.

(2) The Division shall maintain a file of information submitted under Subsection (1).

(3) Except for services procured under Sections R23-2-17 and R23-2-19, an updated or project specific statement of qualifications shall generally be required in order to be considered in procurements of services for a specific project as provided in the solicitation.

R23-2-4. Public Notice of Solicitations.

The Division shall publicize its needs for architect-engineer services in the manner provided in Subsection R23-1-5(2). The public notice shall include:

(1) the closing time and date by which the first submittal of information is required;

(2) directions for obtaining the solicitation;

(3) a brief description of the project; and

(4) notice of any mandatory pre-submittal meetings.

R23-2-5. Submittal Preparation Time.

Submittal preparation time is the period of time between the date of first publication of the public notice, and the date and time set for the receipt of submittals by the Division. In each case, the submittal preparation time shall be set to provide architects and engineers a reasonable time to prepare their submittals. The time between the first publication of the public notice and the earlier of the first required submittal of information or any mandatory meeting shall be not less than ten calendar days, unless a shorter time is deemed necessary for a particular procurement as determined, in writing, by the Director.

R23-2-6. Form of Submittal.

The solicitation may provide for or limit the form of submittals, including any forms for that purpose.

R23-2-7. Addenda to Solicitations.

Addenda to the solicitation may be made in the same manner provided for addenda to the bidding documents in connection with Invitations for Bids set forth in Subsection R23-1-5(6) except that addenda may be issued until the selection of an architect or engineer is completed.

R23-2-8. Modification or Withdrawal of Submittals.

- (1) Submittals may be modified prior to the due dates established in the solicitation.
- (2) Architects and engineers may withdraw from consideration until a contract is executed.

R23-2-9. Late Proposals and Late Modifications.

Except for modifications allowed pursuant to negotiation, any proposal or modification received at the location designated for receipt of submittals after the due dates established in the Solicitation shall be deemed to be late and shall not be considered unless no other submittals are received.

R23-2-10. Receipt and Registration of Submittals.

After the date established for the first submittal of information, a register of submitting architects and engineers shall be prepared and open to public inspection. Prior to award, proposals and modifications shall be shown only to procurement officials and other persons involved with the review and selection process.

R23-2-11. Disclosure of Contents of Submittals and References.

(1) Except as provided in this rule, submittals of the successful architect or engineer shall be open to public inspection after award of the contract. Submittals of architects and engineers who are not awarded contracts shall not be open to public inspection.

(2) The Solicitation may provide that certain information required to be submitted by the offeror shall be considered confidential and classified as protected if such information meets the provisions of Section 63-2-304 of the Government Records Access and Management Act.

(3) If the architect or engineer selected for award has requested in writing the non-disclosure of trade secrets and other proprietary data so identified, the Director shall examine the request to

determine its validity prior to award of the contract. If the parties do not agree as to the disclosure of data in the contract, the Director shall inform the architect or engineer in writing what portion of the proposal will be disclosed and that, unless the architect or engineer withdraws the submittal, it will be disclosed.

(4) The Board finds that it is necessary to maintain the confidentiality of ~~[individual responses from persons who are contacted as references]~~ past performance and reference information in order to avoid competitive injury and to encourage those persons providing the information to respond in an open and honest manner without fear of retribution. Accordingly, ~~[responses to requests for references are]~~ records containing past performance and reference information are classified as protected records under the provisions of Subsection 63-2-304(2) and (6) and shall be disclosed only ~~[in summary form]~~ to those persons involved with the performance evaluation, the architect-engineer that the information addresses and persons involved with the review and selection of [process] submittals. The Division may, however, provide reference information to other governmental entities for use in their procurement activities and to other parties when requested by the architect-engineer that is the subject of the information. [This Subsection (4) applies only to responses from references submitted by the architect or engineer.]

R23-2-12. Selection Committee.

(1) The Board delegates to the director the authority to appoint a selection committee which may include representatives of the Board, the Division, the using agency, and architects, engineers and others of the general public.

(2) Each member of the selection committee shall certify as to his lack of conflicts of interest.

R23-2-13. Evaluation and Ranking.

(1) The selection committee shall evaluate the relative competence and qualifications of architects and engineers who submit the required information.

(2) The evaluation shall be based on evaluation factors set forth in the solicitation and may include:

- (a) past performance and references;
- (b) ~~[references]~~ qualifications and experience of the firm and key individuals;
- (c) plans for managing and avoiding project risks;
- (d) interviews; and
- (e) other factors that indicate the relevant competence and qualifications of the ~~[architect or engineer]~~ architect-engineer and the architect-engineer's ability to satisfactorily provide the desired services.

(3) The evaluation may be conducted in two phases with the first phase identifying no less than the top three ranked firms to be evaluated further in the second phase unless less than three firms are competing for the contract.

(4) Numerical rating systems may be used but are not required.

(5) The evaluation committee shall rank at least the top three firms. Notice of the selection results shall be provided to each firm competing for the contract.

R23-2-14. Negotiation and Appointment.

The Director shall conduct negotiations as provided for in Section 63-56-44 until an

136 agreement is reached.

137
138 **R23-2-15. Role of the Board.**

139 (1) The Board has the responsibility to establish and monitor the selection process. It must
140 verify the acceptability of the procedure and make changes in procedure as determined necessary by
141 the Board.

142 (2) At each regular meeting of the Board, the Division shall submit a list of all
143 architect/engineer contracts entered into since its previous report and the method of selection used.
144 This shall be for the information of the Board.

145
146 **R23-2-16. Performance Evaluation.**

147 (1) The ~~[using agency and staff from the]~~ Division shall evaluate the performance of the
148 architectural/engineering firm and shall provide an opportunity for the using agency to comment on
149 the Division's evaluation.

150 (2) This rating shall become a part of the record of that architectural/engineering firm within
151 the Division. The architectural/engineering firm shall be apprised in writing of ~~[their]~~ its
152 performance rating at the end of the project and may enter ~~[their]~~ its response in the file.

153 (3) Confidentiality of the evaluation information shall be addressed as provided in
154 Subsection R23-2-(4).

155
156 **R23-2-17. Emergency Conditions.**

157 The Director, in consultation with the chairman of the Board, shall determine if emergency
158 conditions exist and document his decision in writing. The Director may use any reasonable method
159 of awarding contracts for architect-engineer services in emergency conditions.

160
161 **R23-2-18. Direct Awards.**

162 (1) The Director may award a contract to an architectural/engineering firm without
163 following the procedures of this rule if:

164 (a) The contract is for a project which is integrally related to, or an extension of, a project
165 which was previously awarded to the architectural/engineering firm;

166 (b) The architectural/engineering firm performed satisfactorily on the related project; and

167 (c) The Director determines that the direct award is in the best interests of the State.

168 (2) The Director shall place written documentation of the reasons for the direct award in the
169 project file and shall report the action to the Board at its next meeting.

170
171 **R23-2-19. Small Purchases.**

172 (1) If the Director determines that the services of architects and engineers can be procured
173 for less than \$50,000, or if the estimated construction cost of the project is less than \$500,000, the
174 procedures contained in Subsection (2) may be used.

175 (2) The Director shall select a qualified firm and attempt to negotiate a contract for the
176 required services at a fair and reasonable price. The qualified firm may be, but is not required to be,
177 selected from the register of architectural and engineering firms provided for in Section R23-2-3. If,
178 after negotiations on price, the parties cannot agree upon a price that, in the Director's judgment, is
179 fair and reasonable, negotiations shall be terminated with that firm and negotiations begun with

another qualified firm. This process shall continue until a contract is negotiated at a fair and reasonable price.

R23-2-20. Alternative Procedures.

(1) The Division may enhance the process whenever the Director determines that it would be in the best interest of the state. This may include the use of a design competition.

(2) Any exceptions to this rule must be justified to and approved by the Board.

(3) Regardless of the process used, the using agency shall be involved jointly with the Division in the selection process.

KEY: procurement*, architects, engineers

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63-56-14(2)